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7 BEFORE THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON
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10 In the Matter of the Application
11 regarding the Conversion and
12 Acquisition of Control of Premera Blue
13 Cross and its Affiliates.

No. G 02-45

PREMERA'S RESPONSE TO
INTERVENER GROUPS' MOTION
FOR COMMISSIONER'S REVIEW

14 INTRODUCTION

15 There are two provisions in the Special Master's recommended Protective Order
16 that the four Intervener Groups seek to change.

17 Premera does not object to one of the requests -- namely, that the paralegals and
18 secretaries assigned to work on the matter with the three attorneys from the Washington
19 Protection and Advocacy System and with the two attorneys from Covington & Burling
20 be included in the definition of "Parties' Counsel." Premera does, however, object to any
21 change in the proposed Protective Order regarding the limitation that only one
22 representative of each Intervener Group be allowed access to Confidential Information.
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PREMERA'S RESPONSE TO INTERVENER
GROUPS' MOTION FOR COMMISSIONER'S
REVIEW - 1

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1 THE PROVISION REGARDING PARALEGALS AND SECRETARIES

2 The Washington Protection and Advocacy System has three in-house attorneys
3 working on the case. In regard to the attorneys from Covington & Burling, Premera
4 objected to the proposal of the Welfare Rights Organizing Coalition that it be permitted to
5 designate Covington & Burling in addition to Columbia Legal Services as attorneys who
6 could have access to Confidential and Attorneys' Eyes Only ("AEO") Information. The
7 Special Master limited the participation of Covington & Burling to two attorneys from
8 that firm: Kurt Calia and David Jolley.

9 Premera does not object to having the paralegal and secretary for each of these five
10 attorneys being included in the list of those who can have access to such Information.
11 However, it does object to revising the Protective Order to include the open-ended and
12 vague term, "support staff" -- such support staff at Covington & Burling undoubtedly
13 numbers in the hundreds -- which could be misused so as to add to the already too
14 numerous list of persons who have access to this Information.

15 Accordingly, Premera proposes that the following revision be made to page 5,
16 lines 2 to 5 of the proposed Protective Order:

17 For Welfare Rights Organizing Coalition -- Columbia
18 Legal Services; Kurt Calia and David Jolley and a secretary
19 and paralegal for each of them (of Covington & Burling).
 [Addition is underlined]

20 For Washington Protection and Advocacy System --
21 Daniel S. Gross, David Girard, Deborah A. Dorfman and a
 secretary and paralegal for each of them. [Addition is
 underlined]

1 THE REPRESENTATIVE OF EACH INTERVENER GROUP PROVISION

2 The Special Master made an appropriate decision to limit the number of
3 representatives who can see Confidential Information, and his recommendation should be
4 accepted by the Commissioner.

5 A. The Provision at Issue

6 The provision at issue appears in Section 3 ("Right of Access to Designated
7 Information"), subsection "a" ("Confidential Information"), at page 11, lines 6 to 8, of the
8 proposed Protective Order. Disclosure of Confidential Information is limited to certain
9 people, including:

10 (4) one representative of each Intervener Group designated
11 to assist Parties' Counsel with the preparation of this
12 hearing, provided that such representative shall execute an
 Appendix A Declaration.

13 During the meetings with the Special Master, each of the Intervener Groups
14 requested that they have four representatives, for a total of 16 representatives. Now they
15 are asking that there be 18 such representatives: four for the Hospital Associations Group,
16 four for the Washington State Medical Association, four for the Premera Watch Coalition,
17 and six for the Alaska Interveners.

18 Premera objected to the circus-like atmosphere that would inevitably result from
19 having so many people potentially in attendance at every deposition, to say nothing of the
20 vastly increased risk that there would be an inadvertent disclosure of the Confidential
21 Information as more and more people make more and more copies of this information and
22 take it to more and more places.

23 Premera put its money where its mouth was by agreeing to accept a similar
24 limitation on the number of its representatives that could look at other parties'
25 Confidential Information. The proposed Protective Order stated, at page 11, lines 4 to 6,

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1 that such Confidential Information can be disclosed only to “one representative of
2 Premera designated to assist Premera’s Counsel with the preparation of this hearing,
3 provided that each such representative shall execute an Appendix A Declaration.” The
4 Commissioner should impose the same limitation on the Intervener Groups.

5 B. The Intervener Groups’ Arguments are Without Merit

6 1. The Special Master has already considered all
7 of the Intervener Groups’ arguments.

8 The arguments raised by Intervener Groups in their Motion are the very same
9 arguments they made when the parties met in person with the Special Master. They also
10 reiterated their position in the drafts that were submitted to the Special Master for
11 consideration. There is no suggestion in the Intervener Groups’ Motion for Review that
12 the Special Master failed to hear or to consider their arguments.

13 As a former trial judge who has handled complex litigation involving the
14 protection of confidential information, the Special Master is in a unique position to
15 evaluate the appropriateness of limitations on access to such confidential information. His
16 recommendation should be supported.

17 2. The Intervener Groups have forgotten the purpose of
18 their being granted the status of Intervener.

19 Contrary to the tenor of the Intervener Groups’ Motion for Review, this Matter is
20 not “all about them.” The Intervener Groups have been permitted to participate in order to
21 assist the Commissioner in making an informed decision.

22 The Fourth Order (“Order”) is very clear on that point. At page 7, lines 12 to 14,
23 of the Order, the Commissioner concluded that the interveners “can present information, a
24 perspective, and expertise different from or broader than that provided by the OIC Staff or
25 Premera.” At the same time, the Order stated, at page 3, line 6, that “intervention will be

1 subject to certain conditions and limitations.” See RCW 34.05.443(2). In the interest of
2 efficiency, the Commissioner required that the various interveners combine into groups.
3 (Page 6, lines 20-21.) Each group was to designate a lead attorney “who shall speak and
4 act for the group.” (Page 6, lines 21-22) “Each group shall be treated as a single and
5 separate party for the purposes of discovery, briefing, presentation of evidence,
6 examination and cross-examination of witnesses, argument, and service of papers.”¹ Such
7 limitations are expressly authorized under RCW 34.05.443(2).

8 3. The Intervener Groups failed to appeal the Fourth Order

9 At bottom, all of the arguments in their Motion come down to this: the Intervener
10 Groups do not feel that there should be any restrictions on their participation in this
11 Matter. But the Order places substantial restrictions on the issues that they can address at
12 the hearing, on the means by which they can do so, and on how many attorneys can do so.
13 If the Interveners had really felt that such restrictions posed a problem, they could and
14 should have appealed the Fourth Order. Having failed to do so, they should not now be
15 permitted to raise arguments that are re-statements of their apparent dissatisfaction with
16 the limitations and conditions that the Commissioner properly placed on them months ago.

17 4. The fact that the Intervener Groups are composed of diverse parties is not
18 justification for having more than one representative per Intervener Group.

19 In seeking leave to intervene, the Interveners asserted that they could act in a
20 representative capacity for the hundreds or thousands of constituents that they said they
21 represented. Now they claim that their very ability to “make intelligent, informed
22 decisions regarding how best to protect those interests” is imperiled by the fact that the

23 ¹ The Intervener Groups have already violated these requirements by having nine
24 attorneys sign their Motion For Commissioner’s Review, rather than the four designated
25 lead attorneys (McCullough, Hamburger, Madden and Coopersmith). In their Response to
Premera’s Motion for Review, dated May 15, 2003, they again violated the requirements
by having 10 attorneys, rather than the four designated lead attorneys, sign the pleading.

1 attorneys for the Intervener Groups -- over two dozen of them² -- will have to work
2 with four representatives (one from each Intervener Group). They provide no
3 substantiation for that claim, other than a generalized assertion about the diversity of the
4 groups that they represent. But the fact is that, even with four representatives for each
5 Intervener Group, they would still have to select from among their constituents. The
6 Commissioner was interested in establishing Intervener Groups, and the Special Master's
7 limitation of access to Confidential Information to one representative per group is
8 consistent with that goal.³

9 5. There is no merit to the claims regarding ethical requirements.

10 The Intervener Groups fail to provide any legal authority for their assertions about
11 ethical problems that they say arise from having only one representative per Intervener
12 Group. There is no such authority. The very Rules of Professional Conduct they cite
13 recognize a reasonableness standard for communications. For example, RPC 1.4(b)
14 requires only that a lawyer explain a matter to the extent "reasonably necessary" to permit

15 ² The four Lead Attorneys for the Intervener Groups identified the following 27 attorneys
16 to the Special Master as those whom they expected to be working on this Matter (and for
17 whom they sought access to Confidential and AEO Information): Mr. Coopersmith
18 proposed two attorneys: Emily Davis and himself. Mr. Madden proposed six attorneys,
19 five from his firm (Anne Redman, David Bennett, Dierk Meierbachtol, Michael Shachat
20 and himself) and Taya Briley, general counsel with the AWPHD. Ms. McCullough
21 proposed eight attorneys: James J. Davis, Jr. and herself from Alaska Legal Services;
22 Ardith Lynch, James A. Parrish, Mary E. Greene and Michael P. Hostina from the
University of Alaska; Nelson Page from Burr Pease & Kurtz; and local counsel, Maritza
Rivera. Ms. Hamburger proposed 11 attorneys: John Midgley and herself from Columbia
Legal Services; Kurt Calia and David Jolley from Covington & Burling; Daniel S. Gross,
David Girard and Deborah A. Dorfman from Attorneys for Washington Protection and
Advocacy System; and Rick Spoonemore, Jon Meier, Steve Sirianni and Chris Youtz
from Sirianni, Youtz, Meier & Spoonemore.

23 ³ Interveners seek to rely upon one provision in the King County protective order, without
24 pointing out the significant differences in that case. Among other things, the plaintiffs
25 there are represented by a single law firm, and the total number of people who can see
designated documents is substantially fewer than in this proceeding.

1 the client to make an informed decision regarding the representation. It does not require
2 that each entity or person in a group have access to discovery materials. RPC 1.2(a)
3 involves consultation with the client; it does not mandate showing the client any particular
4 document.

5 It is telling that the Intervener Groups have no problem with the Special Master's
6 requirement that AEO Information be shown only to attorneys, even though such a
7 requirement means that none of the attorneys' clients have access to what is even more
8 sensitive information than Confidential Information. If there can be a total prohibition of
9 showing AEO documents to all representatives of an Intervener Group, certainly it is
10 permissible to limit the showing of Confidential Information to one representative of each
11 Group. The Rules of Professional Conduct do not prevent the imposition of limitations,
12 such as those in this Protective Order, on whether, and to what extent, a client can see
13 documents in discovery.

14 Finally, the Intervener Groups' argument regarding potential conflicts among
15 Interveners is based on a false premise and proves too much. The requirement that they
16 choose a representative, like the requirement that they choose a lead attorney, is simply a
17 limitation imposed by the Commissioner in the interest of a reasonable and an efficient
18 hearing and a process that will assist him in making his decision. What the Intervener
19 Groups have is a choice, not a conflict. Their argument proves too much because, if it is
20 accepted, there is no reason to stop at four or six representatives. Why not authorize every
21 member of every group or coalition to see Confidential Information?

22 CONCLUSION

23 The Commissioner should make the agreed correction in regard to the secretaries
24 and paralegals for the three Washington Protection and Advocacy System attorneys and
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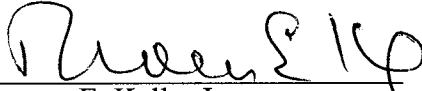
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1 for the two Covington & Burling attorneys. The Commissioner should reject the request
2 of the Intervener Groups to expand the number of representatives who can have access to
3 Confidential Information.

4 DATED this 16th day of May, 2003.

6 PRESTON GATES & ELLIS LLP

7 By 
8 Thomas E. Kelly, Jr., WSBA # 05690
9 Robert B. Mitchell, WSBA # 10874
10 Attorneys for PREMERA and
11 Premera Blue Cross
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PREMERA'S RESPONSE TO INTERVENER
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In the Matter of the Application
Regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates

No. G02-45

CERTIFICATE OF SERVICE

I, Dennis M Tessier, certify that I served a copy of the following document(s):

**1. PREMIERA'S RESPONSE TO INTERVENER GROUPS' MOTION
FOR COMMISSIONER'S REVIEW**

on all parties or their lead counsel of record on the date below as follows:

Service To:	Service Perfected By:
Carol Sureau Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255 (Original & 4 plus 1 Electronic via E-Mail)	<input type="checkbox"/> By United States Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
John F. Hamje Legal Affairs Division Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile

CERTIFICATE OF SERVICE - 1
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Amy McCullough Alaska Legal Services Corporation 1016 West 6 th Avenue, Ste. 200 Anchorage, AK 99501	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
Eleanor Hamburger John Midgley Columbia Legal Services 101 Yesler Way, Suite 300 Seattle, WA 98104	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
Michael Madden Michael S. Shachat Bennett Bigelow & Leedom, P.S. 999 Third Avenue, Suite 2150 Seattle, WA 98104	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
Jeff Coopersmith Coopersmith & Associates, Inc. 701 Fifth Avenue, Suite 4200 Seattle, WA 98104	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail

CERTIFICATE OF SERVICE - 2
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1 I certify under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this Friday, May 16, 2003.

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6 Dennis M. Tessier
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